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No. 87-1065

In the Supreme Court of the United States

October Term, 1987

NATIONAL COUNCIL ON COMPENSATION INSURANCE
Petitioner,

v.

FRED KYLE and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY BRIEF

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INTRODUCTION

This case comes before the Court on two separate Petitions for Certiorari, one filed by the federal government (87-1045) and the other filed by the National Council on Compensation Insurance ("NCCI"), an intervenor in the Court below (87-1065). The Respondent does not oppose certiorari in either case, but nevertheless suggests both petitions be held in abeyance and disposed of in light of the anticipated decision in the similar cases of *Sebben* or *Broyles*.[1] There is, therefore, agreement on the necessity of Certiorari to review these important issues. The Respondent's suggestions of abeyance, however, are not compelling as his arguments are neither relevant to the issues raised in NCCI's Petition nor supported by a careful examination of the present record.

ARGUMENT

There are essentially three reasons offered by the Respondent as grounds for holding NCCI's Petition in abeyance. The first portrays NCCI as a litigant with little procedural or substantive interest in this litigation. Brief of Kyle at 4-5. The Respondent argues NCCI's intervention after the circuit's initial ruling[2] somehow demonstrates an attenuated "procedural" involvement which justifies placing the Petition in limbo. The fundamental flaw with this notion is that NCCI was unaware of the lower court's

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[1] *Pittston Coal Group v. Sebben*, Nos. 87-821 & 87-827 (Sup.Ct., filed November 21, 1987). The Court accepted certiorari in both petitions on February 22, 1988. 56 U.S.L.W. 3555. *Broyles v. Director, Office of Worker's Comp. Programs*, 824 F.2d 327 (4th Cir., 1987), *cert. filed* (No. 87-1095, filed December 29, 1987).

[2] The Sixth Circuit issued its decision on May 19, 1987, Record at 1a, but granted an enlargement of time until July 1, 1987 for Petitions for Rehearing. Whereas, NCCI's Motion for Leave to Intervene on Rehearing was served on June 23, 1987. Record at 18a. Its motion was granted on July 15, 1987. Record at 12a. Rehearing was later denied on September 22, 1987. Record at 11a.

intention to transfer §410.490 to Part C claims *until* the Court issued its decision. Record at 15a. Indeed, NCCI's interest in this litigation did not arise until the sixth circuit altered the rules upon which the interests of NCCI's constituents were adjudicated.[3] Prior to that ruling, the sixth circuit action did not impair or impede NCCI's interests such that it could have intervened. *See* F.R.C.P. 24. As to the "substantive" matters, the Respondent erroneously argues that insurance companies have no interest in black lung adjudications as they are never parties to administrative claims. Brief of Kyle at 5. On the contrary, all coal mine operators are required to secure their liability by proper insurance.[4] 30 U.S.C. §933. The insurance company is then substituted for the coal operator and obliged to discharge the administrative and payment obligations imposed upon the operator by the regulatory and statutory scheme. 20 C.F.R. §726.207. Their integral role in the statutory scheme is recognized by the Department of Labor ("DOL") regulations which explicitly require that insurance carriers be made *parties* to Part C claims. 20 C.F.R. §725.360(a)(4). Hardly idle by-standers, NCCI constituents are, in fact, actual parties to black lung claims who will be forced by the sixth circuit's mandate to litigate *their* liability under a new and unforeseen standard. The final portion

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[3]The lower court decision in *Kyle* concluded that 30 U.S.C. §902(f)(2) mandated the use of 20 C.F.R. §410.490 in Part C claims. Record at 10a. Part C claims are those paid by private employers. *Mullins Coal Co. of Virginia v. Director, Office of Workers Comp. Programs*, 56 U.S.L.W 4044, 4045 (Sup.Ct., 1987). Part C claims are also insured and reinsured by NCCI constituents. NCCI Petition at ii. Thus, by changing the rules applicable to Part C, the Sixth Circuit significantly affected the ability of NCCI's constituents to defend or protect their interests.

[4]An operator's liability may be secured through the purchase of commercial insurance policies or through self insurance. 20 C.F.R. §725.494.

Respondent's "interest" argument suggests that NCCI's role is attenuated because none of its constituents will be liable for Mr. Kyle's benefits in the event of an award. Brief of Kyle at 5. Respondent may be correct that benefits in this particular case would be paid by the federal government,[5] but that ignores the fact that NCCI is not contesting the individual entitlement of Mr. Kyle. Instead, its Petition challenges the purely legal issue of which regulatory standard should be applied to Part C claims. The lower court essentially invalidated the DOL rule by directing its wholesale replacement with §410.490. Record at 10a. The lower court thus promulgated a new administrative rule directly affecting NCCI's constituents which, in the view of those constituents, operates unilaterally in favor of miners and deprives defendants of their rights to full and fair hearings. NCCI's intervention was, from the very beginning, directed at the circuit court's ruling on the regulatory standard. *See*, Motion for Leave to Intervene, Record at 13a. Its Petition for Certiorari was likewise framed to secure review of the lower court's sweeping revisions of the regulatory scheme. NCCI Petition at *i*. Simply stated, this appeal concerns the proper regulatory standard applicable to NCCI constituents and not merely the preponderance of evidence available in the individual claim of Mr. Kyle.

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[5]*See*, NCCI Petition at *ii*. No coal operator carrier may be liable for a claim where the miner's last coal mine employment predated January 1, 1970. 30 U.S.C. §932(j)(2). Mr. Kyle's last coal mine employment ended in 1951. Record at 25a. NCCI, however, did not intervene to challenge Mr. Kyle's benefits, but rather to challenge the circuit court's holding on the administrative rule. Record at 15-17a.

Accordingly, the measure of NCCI's interest in this litigation[6] must be judged from the harm occasioned by the new administrative rule and not the payments to Mr. Kyle.

The Respondent next complains that the questions presented in NCCI's appeal were never presented to the lower court panel, "prior to its ruling". Brief of Kyle at 6. As the Court generally declines review of matters never presented below, Respondent asserts that review here is unwarranted. Brief of Kyle at 6. Significantly, the Respondent did not allege that NCCI's issues were never presented below, only that they were never presented before NCCI intervened in the circuit court. NCCI did not intervene until *after* the sweeping decision of the sixth circuit for it was that decision which created the basis and necessity for intervention. The inquiry should not be directed at what NCCI did before it became a party, but what it did afterward. Properly stated, the question is whether NCCI's arguments were presented below so as to allow the appropriate proffers of evidence[7] or legal arguments and to allow the lower court to consider those arguments. *Accord, Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *Hormel v. Helvering*, 312 U.S. 552, 556-559 (1941). Such requirements have been satisfied here, for NCCI raised all of its certiorari arguments when it requested leave to intervene. *Compare*, NCCI Petition at *i, with*

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[6]NCCI's interest here is that of an association seeking to assert its interests (i.e., as manager of the Workers' Compensation Pool and the preparer of rating plans) and the interests of its association members who insure operators under Part C. *See generally, Hunt v. Washington State Apple Advertising Com'n.*, 432 U.S. 333, 344 (1977). Here, for example, NCCI constituents will suffer direct financial loss in the form of unjustified benefit payments when §410.490 is erroneously applied to Part C claims insured by those constituents.

[7]The issues in NCCI's Petition are questions of law. Therefore, the evidence offered below could not affect disposition of NCCI's Petition.

Motion for Leave to Intervene, Record at 15-17a. Those issues were fully briefed to the circuit court which, although unpersuaded, specifically found that "the issues raised in the petitions [for rehearing] were fully considered upon the original submission and decision . . ." Record at 11a. No further action is necessary to preserve these issues for review by this Court.

The third and final argument against plenary review of NCCI's Petition questions whether NCCI's interests might adequately be represented by the Petitioners in *Sebben* or *Broyles*. Brief at Kyle at 5. As to the Director, there is ample evidence that he has no interest in any issue apart from the statutory construction argument raised in his Petition. Director's Petition at I. The government has prepared three Petitions for Certiorari on this issue[8] and never once raised any of the issues presented in NCCI's Petition.[9] Therefore, there is no reason to presume the Director's presence will be duplicative of NCCI's. With regard to the industry Petitioners in *Sebben*, NCCI recognizes their interests may be more aligned than the Director's, but the posture of *Sebben* is quite distinct from the case *sub judice*. The *Sebben* claim arises from a mandamus action in district court raising questions as to the propriety of mandamus, class certifications, and the exclusivity of the black lung appellate process. *See, Petition for Writ of Certiorari* at 13-16, *Pittston Coal Group v. Sebben*, No. 87-821 (Sup. Ct. filed November 21, 1987).[10] While these are legitimate

[8]The three petitions are: *Sebben*, No. 87-827; *Kyle*, No. 87-1045; and *Broyles*, No. 87-1095.

[9]The only issue raised by the Director has been one of statutory construction. Whereas, NCCI has preserved several issues important to industry, including statutory construction. *Compare* Director's Petition at I *with* NCCI's Petition at *i*.

[10]Amid these unrelated issues, *Sebben* also raised the regulatory standard question. Pittston Coal Group Petition at *i* (No. 87-821).

issues, they range far afield from the underlying question of the appropriate regulatory standard which is the core issue here. Should the Court dispose of *Sebben* on any of these "unrelated" grounds, the fundamental questions raised in NCCI's Petition would remain unanswered. Given the importance of the regulatory standard and the recurring nature of that question in the various courts, the interests of sound judicial administration militate in favor of certiorari here. Certainly, the granting of NCCI's Petition will not prevent the Court from disposing of *Sebben* on procedural grounds, but will ensure that the fundamental issues raised by NCCI will be decided by this Honorable Court.

CONCLUSION

The issues presented by NCCI's Petition are of considerable importance to an insurance industry that must defend and pay claims under a new and unforeseen regulatory standard. There is simply no merit to the contention that insurers who must pay benefits under a rule, have no "interest" in how or when that rule is applied.

Respectfully submitted,

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